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UNCLAS SECTION 01 OF 02 OTTAWA 000789

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E.O. 12958: N/A  
TAGS: [PHUM](#) [PGOV](#) [CA](#)  
SUBJECT: CANADA: FREE SPEECH V. HATE SPEECH HEADED TO  
FEDERAL COURTS

REF: A. 08 OTTAWA 1059  
[B](#). 08 OTTAWA 1032  
[C](#). 08 VANCOUVER 264

[1](#). (SBU) Summary: The Canadian Human Rights Commission (CHRC) has appealed to the Federal Court to clarify Canada's hate speech laws after a controversial ruling by the Canadian Human Rights Tribunal. The Tribunal's finding related to the constitutionality of a law and penalty targeting the dissemination of hate speech over the telephone or internet. CHRC accepts the Tribunal's finding that the penalty is unconstitutional but is challenging the decision on two procedural points of law. Advocacy groups reject the idea that the Tribunal's decision represents "a sea-change" in Canada's hate speech laws, however. MPs from all parties continue to voice support for Canada's hate speech laws, while admitting some flaws. End Summary.

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Warman v. Lemire: Judicial History  
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[2](#). (U) In 2003, Ontario attorney Richard Warman had filed separate human rights complaints against white supremacist Marc Lemire, journalist Mark Steyn, and Maclean's magazine with CHRC, the Ontario Human Rights Commission, and the British Columbia Human Rights Tribunal for the dissemination of allegedly anti-Semitic and anti-gay hate speech in an article published by Maclean's and on postings to Lemire's websites. At the provincial level, the cases were ultimately dismissed -- in Ontario, for lack of jurisdiction, and, in British Columbia, for failure to meet the standard of hate speech (reftels).

[3](#). (U) At the federal level, however, the CHRC referred the case to the Tribunal when Warman refused to participate in mediation sessions. Warman claimed that messages posted on websites of which Lemire was the webmaster or owner exposed Italians, Mexicans, Puerto Ricans, Haitians, francophones, Blacks, First Nations persons, East Asians, non-Whites, Jews, and homosexuals to hatred and contempt. Section 13 of the Human Rights Act prohibits the telecommunication of any matter that is "likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination," i.e. religion, race, color, national or ethnic origin, or sexual orientation.

[4](#). (U) On September 2, Athanasios D. Hadjis, Vice Chairman of the Tribunal, refused to apply Section 13 in Warman v. Lemire, finding it "inconsistent with the Charter (of Human Rights), which guarantees the freedom of thought, belief, opinion, and expression" and that the restrictions are not "a reasonable limit" as defined by the Charter. Noting that the Tribunal does not have the statutory authority to declare a law invalid, Hadjis chose instead to "simply refuse to apply these provisions." In his 107 page ruling, Hadjis determined

that Lemire did breach Section 13 in one instance of nine allegations of hate speech. However, he also found that the CHRC had grown increasingly "aggressive" and "penal in nature" and that it sought to exact stiff punitive penalties, not remedial measures, in its handling of human rights cases, thereby rendering Section 13 unconstitutional.

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CHRC Appeal  
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¶5. (U) On October 1, CHRC applied to the Federal Court for judicial review of Warman v. Lemire, seeking a binding decision by a higher court to counter the "uncertainty" raised by the Tribunal's decision. CHRC argued that the Tribunal erred in law on two technical legal issues: when it found that the "manner" of the CHRC's investigations of hate speech complaints rendered the section of law unconstitutional; and, when it found that the punitive measures available in two sub-sections of the law rendered the entirety of Section 13 unconstitutional. (These punitive measures include the levying a penalty and "special compensation" on the defendant.) The Federal Court is expected to hear the case within six months, although its decision could take an additional many months to appear.

¶6. (SBU) The CHRC's senior counsel confirmed to poloff that CHRC agreed with the finding of unconstitutionality of the penalty clause. He underlined, however, that "a refusal to apply the clause would have solved the problem without getting rid of the whole law." He also emphasized that CHRC also endorsed the Tribunal's narrow interpretation of Section

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13, in which the alleged hate speech must say that there is "no redeeming quality" to the person or persons, and must include "extreme virulent feelings of detestations to an entire race - hating merely for drawing breath." The senior counsel, however, distanced CHRC from the findings of a 2008 CHRC-commissioned report by Richard Moon -- which had recommended that only hate speech linked to violence should be restricted and that Section 13 should be repealed -- by insisting that CHRC does not believe a "call to violence" must be included for the law to prohibit the speech.

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Practical implications  
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¶7. (U) For the foreseeable future, CHRC must -- by its mandate -- continue to accept and investigate complaints filed under Section 13, until/unless Parliament repeals it or the Federal Court finds it unconstitutional. Nor are other Tribunal members or provincial tribunals even obliged to adhere to Hadjis' ruling. Advocacy groups and non-profit organizations have publicly supported the CHRC appeal and have denied that this ruling marks a sea-change in Canada's prohibitions against hate speech. B'nai B'rith Canada has reiterated its support for Section 13 and the continued investigation of hate speech against all protected minorities. The Canadian Jewish Congress separately commented that "one ruling by one adjudicator" does not change existing law.

¶8. (U) On October 5, the House of Commons' Committee on Justice and Human Rights reviewed Section 13, hearing testimony from journalists as well as political commentators Mark Steyn and Ezra Levant. Conservative, Liberal, Bloq Quebecois, and New Democratic Party MPs questioned them closely on justifiable limits to free speech; MPs from all parties appeared to support the protection of human rights against, at a minimum, speech that justifies violence against the members of a protected group. Conservative MPs, however, focused their questioning mostly on the time and cost inequities forced by the CHRC process on defendants.

Opposition MPs challenged assertions that freedom of expression is a "higher" right than the protection of minorities against hate speech.

19. (SBU) Comment: There is little public debate over or political interest now in overhauling Canada's federal and provincial human rights legislation -- including Parliamentary abrogation of Section 13 language on penalties -- despite the earlier spike of interest in the Maclean's case. A Federal Court ruling upholding or rejecting Vice Chairman's Hadjis' ruling should eventually help to clarify how the CHRC should proceed in dealing with alleged hate crimes, but that decision could also face a further appeal to the Supreme Court, one way or another.

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